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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 ORLANDO LEROY TILFORD,  
12 CDCR #J-21399,

13 Plaintiff,

14  
15 vs.  
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17 J. CHAU, M.D.;  
18 R. WALKER, D.O.,  
19  
20

21 Defendants.  
22  
23  
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Civil No. 12-2507 GPC (MDD)

**ORDER:**

**(1) GRANTING PLAINTIFF'S  
MOTION TO PROCEED *IN*  
*FORMA PAUPERIS*, IMPOSING  
NO INITIAL PARTIAL FILING FEE  
AND GARNISHING BALANCE  
FROM PRISONER'S TRUST  
ACCOUNT PURSUANT  
TO 28 U.S.C. § 1915(a)  
[ECF No. 2];**

**(2) DENYING MOTION FOR  
PRELIMINARY INJUNCTION  
[ECF No. 4]; and**

**(3) DIRECTING U.S. MARSHAL TO  
EFFECT SERVICE OF COMPLAINT  
PURSUANT TO FED.R.Civ.P. 4(c)(3)  
& 28 U.S.C. § 1915(d)**

25 Orlando Leroy Tilford ("Plaintiff"), a state prisoner currently incarcerated at the Richard  
26 J. Donovan Correctional Facility located in San Diego, California, and proceeding in pro se, has  
27 filed this civil rights Complaint pursuant to 42 U.S.C. § 1983.  
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1 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he  
 2 has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF  
 3 No. 2]. In addition, Plaintiff has filed a “Motion for Preliminary Injunction.” [ECF No. 4].

#### 4 I.

#### 5 MOTION TO PROCEED IFP

6 All parties instituting any civil action, suit or proceeding in a district court of the United  
 7 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
 8 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee  
 9 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*  
 10 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP  
 11 remains obligated to pay the entire fee in installments, regardless of whether his action is  
 12 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847  
 13 (9th Cir. 2002).

14 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a  
 15 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account  
 16 statement (or institutional equivalent) for the prisoner for the six-month period immediately  
 17 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,  
 18 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial  
 19 payment of 20% of (a) the average monthly deposits in the account for the past six months, or  
 20 (b) the average monthly balance in the account for the past six months, whichever is greater,  
 21 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The  
 22 institution having custody of the prisoner must collect subsequent payments, assessed at 20% of  
 23 the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and  
 24 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.  
 25 § 1915(b)(2).

26 The Court finds that Plaintiff has submitted a certified copy of his trust account statement  
 27 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119.  
 28 Plaintiff’s trust account statement shows he has insufficient funds with which to pay any initial

1 partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be  
 2 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the  
 3 reason that the prisoner has no assets and no means by which to pay [an] initial partial filing  
 4 fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”  
 5 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack  
 6 of funds available.”).

7 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP [ECF No. 2], and  
 8 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350  
 9 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court  
 10 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

## 11 II.

### 12 EX PARTE APPLICATION FOR INJUNCTIVE RELIEF

13 To prevail on a motion for preliminary injunction, the moving party must establish (1) that  
 14 he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence  
 15 of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction  
 16 is in the public interest. *Winter v. Natural Res. Defense Counsel, Inc.*, 555 U.S. 7, 20 (2009).  
 17 The Ninth Circuit has also “articulated an alternate formulation of the *Winter* test, under which  
 18 ‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the  
 19 plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that  
 20 there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Farris*  
 21 *v. Seabrook*, 677 F.3d 848, 864 (9th Cir. 2012) (quoting *Alliance for the Wild Rockies v. Cottrell*,  
 22 632 F.3d 1127, 1135 (9th Cir. 2011.)

23 In his Motion, Plaintiff contends that he is not receiving adequate medical attention and  
 24 appropriate pain medication for his medical condition. (ECF No. 4 at 5.) In order to prevail on  
 25 this Motion for Preliminary Injunction, Plaintiff must demonstrate that he is likely to succeed  
 26 on the merits of his Eighth Amendment claim. Where an inmate’s claim is one of inadequate  
 27 medical care, the inmate must allege “acts or omissions sufficiently harmful to evidence  
 28 deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

1 Such a claim has two elements: “the seriousness of the prisoner’s medical need and the nature  
2 of the defendant’s response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.  
3 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir.  
4 1997). A medical need is serious “if the failure to treat the prisoner’s condition could result in  
5 further significant injury or the ‘unnecessary and wanton infliction of pain.’” *McGuckin*, 974  
6 F.2d at 1059 (quoting *Estelle*, 429 U.S. at 104). Indications of a serious medical need include  
7 “the presence of a medical condition that significantly affects an individual’s daily activities.”  
8 *Id.* at 1059-60. By establishing the existence of a serious medical need, an inmate satisfies the  
9 objective requirement for proving an Eighth Amendment violation. *Farmer v. Brennan*, 511  
10 U.S. 825, 834 (1994).

11 In general, deliberate indifference may be shown when prison officials deny, delay, or  
12 intentionally interfere with a prescribed course of medical treatment, or it may be shown by the  
13 way in which prison medical officials provide necessary care. *Hutchinson v. United States*, 838  
14 F.2d 390, 393-94 (9th Cir. 1988). Before it can be said that a inmate’s civil rights have been  
15 abridged with regard to medical care, however, “the indifference to his medical needs must be  
16 substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this  
17 cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citing  
18 *Estelle*, 429 U.S. at 105-06). *See also Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

19 As set forth below, the Court finds that Plaintiff has alleged sufficient facts to state an  
20 Eighth Amendment claim in this matter. However, the mere fact that Plaintiff has stated an  
21 Eighth Amendment claim sufficient to survive the Court’s required sua sponte screening is not  
22 sufficient to find that he is likely to succeed on the merits. Moreover, there is insufficient  
23 evidence in the record before the Court that Plaintiff will suffer an irreparable injury that is  
24 required to justify extraordinary injunctive relief. *See Caribbean Marine Services Co., Inc. v.*  
25 *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Thus, the Court must **DENY**, without prejudice,  
26 Plaintiff’s Motion for Preliminary Injunction [Doc. No. 4] pursuant to FED.R.CIV.P. 65.

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### III.

#### SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, courts “have an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)). The court may not, however, “supply essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.” *Id.*

As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Lopez*, 203 F.3d at 1126-27. Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service on his behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process, and perform

all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court may order that service be made by a United States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”). Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

#### IV.

#### CONCLUSION AND ORDER

Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

1. Plaintiff’s Ex Parte Motion for Injunctive Relief is **DENIED** without prejudice pursuant to FED.R.CIV.P. 65 [Doc. No. 4].

2. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is **GRANTED**.

3. The Secretary of California Department of Corrections and Rehabilitation, or his designee, is ordered to collect from Plaintiff’s prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the trust account in an amount equal to twenty percent (20%) of the preceding month’s income credited to the account and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

4. The Clerk of the Court is directed to serve a copy of this order on Matthew Cate, Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883, Sacramento, California 94283-0001.

**IT IS FURTHER ORDERED** that:

5. The Clerk shall issue a summons as to Plaintiff’s Complaint [ECF No. 1] upon Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order and a certified copy of his Complaint and the summons so that he may serve Defendants. Upon


1 receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and  
2 accurately as possible, and to return them to the United States Marshal according to the  
3 instructions provided by the Clerk in the letter accompanying his IFP package. Upon receipt,  
4 the U.S. Marshal shall serve a copy of the Complaint and summons upon Defendants as directed  
5 by Plaintiff on the USM Form 285s. All costs of service shall be advanced by the United States.  
6 *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

7 6. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint within the  
8 time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42  
9 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right to  
10 reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility  
11 under section 1983," once the Court has conducted its sua sponte screening pursuant to 28  
12 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based on  
13 the face on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the  
14 merits," the defendant is required to respond).

15 7. Plaintiff shall serve upon the Defendants or, if appearance has been entered by  
16 counsel, upon Defendants' counsel, a copy of every further pleading or other document  
17 submitted for consideration of the Court. Plaintiff shall include with the original paper to be  
18 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy  
19 of any document was served on Defendants, or counsel for Defendants, and the date of service.  
20 Any paper received by the Court which has not been filed with the Clerk or which fails to  
21 include a Certificate of Service will be disregarded

22 IT IS SO ORDERED.

23 DATED: December 17, 2012

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25 HON. GONZALO P. CURIEL  
26 United States District Judge  
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